

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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CLERK LAS CRUCES

PAUL F. WEINBAUM,

Plaintiff,

v.

CIV 03-1043 RB/LAM

LAS CRUCES PUBLIC SCHOOLS;
LOUIS MARTINEZ as Superintendent of
The Las Cruces Public Schools,
CHUCK DAVIS, LEONEL BRISENO,
GENE GANT, JOHN SCHWEBKE, and
SHARON WOODEN as School Board Members
of Las Cruces Public Schools

Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW Defendants, Las Cruces Public Schools et al., by and through their counsel of record, HOLT ■ BABINGTON ■ MYNATT P.C. (William R. Babington, Jr.) and hereby submit the following Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Las Cruces Public School (herewith LCPS) is a governmental entity created by statute, governed by a School Board which is elected.
2. Since at least 1972, the Las Cruces Public Schools have marked their maintenance vehicles with a circular emblem, containing the words "Las Cruces Public Schools", "FOR OFFICIAL USE ONLY" and "three crosses in the center of a sunburst"
3. The origin of the emblem used in the LCPS maintenance vehicles is unknown.
4. The emblem is not used on any other vehicles within the LCPS other than maintenance vehicles.

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5. The emblem used is similar to that used by the City of Las Cruces in the mid 1960's in that both used three crosses placed in a sunburst to identify themselves as a part of Las Cruces.

6. The emblem identifies the maintenance vehicle as belonging to LCPS.

7. The emblems were placed on the maintenance vehicles at the direction of Mr. Luitl Miller who was the Associate Superintendent for Physical Plant and Maintenance to readily identify the vehicles as belonging to the Las Cruces Public Schools.

8. The use of the emblem on Las Cruces Public Schools was used by teachers and staff as a way to identify official vehicles from those private vehicles as a means to increase awareness and protect children under their care.

9. The use of crosses to represent the city and community of Las Cruces is quite common and well known.

10. "Las Cruces" is a Spanish term meaning "The Crosses" in English.

11. The exact origin of the term "Las Cruces" is unknown; however, the term "Las Cruces" has been used to describe the City and origin of Las Cruces since the 18th Century.

12. The Las Cruces Public Schools has adopted a set of policy and procedures to govern the school system.

13. One of the policy and procedure instructions currently in effect is LCPS policy #424 Religion in the Schools.

14. Policy #424 sets forth guidelines for dealing with the teaching of religion in the Las Cruces Public Schools.

15. The Las Cruces Public Schools promotes visual and performing arts within the School system.

16. In 2000, the U. S. Department of Education 21st Century Learning Center in partnership with the Las Cruces Public Schools funded various educational projects.

Center's Safe After School Program at Booker T. Washington Elementary School in Las Cruces.

19. The Court Youth Center is a non-profit corporation which works with youth in the City of Las Cruces.

20. The mural was created with the assistance of visual artist Ken Wolveton.

21. Mr. Wolveton is a well-known and full time artist who resides in Cerrillos, New Mexico.

22. The process involved in creating the mural included the students deciding the nature and the subject matter for the mural. The students would be asked to sketch out their various ideas to be used in the mural. The sketches would be laid out and placed together to create the rough mural. Mr. Wolveton would assist the students in the actual making of the final mural product.

23. The mural located at Booker T. Washington Elementary consists of five (5) panels and a commemorative plaque.

24. The commemorative plaque has a quote from Mr. Washington in English and Spanish and notes that mural was created by students in the Court Youth Center's Safe After School Program.

25. As shown in the photographs of the mural, the end panels of the mural represent a student and Mr. Washington respectively. Each of the three panels in the center show the Organ Mountains as a background: one panel shows the chile fields of the Mesilla Valley and chile, one panel shows three crosses, and the last panel shows the desert and a Yucca.

26. Located near Booker T. Washington Elementary are three crosses maintained by the City of Las Cruces honoring the name of the City.

CONCLUSIONS OF LAW

1. The Court has two remaining issues before it: (1) Whether the mural at the Booker T. Washington Elementary School was created in violation of the Las Cruces Public Schools Policy and Procedure #424 Teaching of Religion and demonstrates that policy #424 is not being correctly applied and (2) whether the use of maintenance vehicle emblems which contain crosses in the emblem is a violation of the Establishment Clause of the First Amendment.

2. The Tenth Circuit continues to apply the *Lemon* factors, as modified by the endorsement test, while remaining mindful to the teachings of *McCreary County* and *Van Orden*. These factors include purpose, effect, reasonable observer, and entanglement.

The Mural at Booker T. Washington Elementary

3. The Court has previously held that Policy and Procedure #424 Teaching of Religion as written is constitutional.

4. Plaintiff has suggested that the mural at Booker T. Washington Elementary School in Las Cruces shows that Policy #424 is not being applied properly.

5. The actual purpose of the mural was to provide educational assistance as well as protection to children (sometimes referred to as latch key children) in the form of an after school program.

6. The mural at Booker T. Washington was created by students with the assistance of an artist who was not affiliated with the schools. While the mural is certainly permanent, it was initiated by students and for students in the Court Youth Safety After School program.

7. The mural is a project created by children reflecting well identified things and areas in Las Cruces. There has been no showing that the creation of the mural was to promote sectarian religious beliefs or was created in violation of the guidance provided by Policy and Procedure #424.

8. The effect of the mural is not to promote or endorse any religious beliefs or program but rather to celebrate the surroundings of Las Cruces.

9. The reasonable observer would note that the mural in large part celebrates Booker T. Washington, the school and its place in Las Cruces represented by Mr. Washington, a child, chile, yucca, and three crosses. It is a mural which represents the essence of the Booker T. Washington elementary school. Additionally it is accompanied by a plaque directly adjacent to the mural explaining its purpose and who created the mural.

10. When considering the effect of the mural using a "reasonable observer aware of the history and context", the mural does not create entanglement, but simply reflects the Las Cruces locale. The entanglement analysis is typically applied in circumstances in which the state or school, in this case, is involving itself with a recognized religious activity or institution. Entanglement is not shown in the mural.

11. Accordingly, Defendants have not violated the Establishment Clause by allowing the Booker T. Washington Elementary School to have a mural which depicts among other things, three crosses, nor has there been a showing that Las Cruces Public School Policy and Procedure #424 has been applied in an inappropriate, illegal, or incorrect manner.

Maintenance Vehicle Emblems

12. The maintenance vehicles for the Las Cruces Public Schools have been so identified since at least 1972, with an emblem which contains three small crosses in a sunburst surrounded by lettering of Las Cruces Public Schools and For Official Use Only.

13. Based on circumstantial evidence, the purpose of the emblem was to readily identify the maintenance vehicles and apparently its personnel, as having some legitimate purpose for being on school grounds.

14. Teachers on playground duty use the marked vehicles as a way to distinguish between authorized personnel and unauthorized personnel on school grounds as a means to protect the children on the playground.

15. Plaintiff has failed to present any evidence that the emblem has a purpose other than to identify the vehicles as belonging to the Las Cruces Public Schools.

16. The emblem's effect does not connote an expression or demonstration of approval or support for any particular religion. Given the placement of identifying language in large letters i.e. Las Cruces Public Schools and For Official Use Only, the existence of three small crosses in a sunburst in the center of the emblem have little or no effect on the public.

17. Plaintiff has failed to allege sufficient facts indicating that the emblem has the principle or primary effect of advancing or endorsing religion.

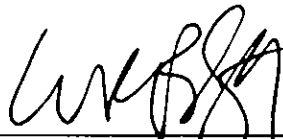
18. Applying the standard of a reasonable observer , the use of three crosses and the connection to Las Cruces is unparalleled. Here the use of three crosses only on maintenance vehicles would not be unusual give the wide use of three crosses by the public and the City of Las Cruces.

19. The use of the emblem on the maintenance vehicles does not show or foster an excessive governmental entanglement with religion. The Las Cruces Public Schools emblem simply uses multiple crosses consistent with its name and the name of the locale in which the Las Cruces Public Schools provides educational services .

20. Accordingly, the emblem used on the maintenance vehicles of the Las Cruces Public Schools is not in violation of the Establishment Clause of the First Amendment.

Respectfully submitted,

HOLT ■ BABINGTON ■ MYNATT P.C.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was e-mailed and mailed to Paul F. Weinbaum, 11025 Black Hills Road, Las Cruces New Mexico 88011 on this 17th day of November, 2006.

A handwritten signature in black ink, appearing to read 'W. R. Babington, Jr.', written over a horizontal line.

William R. Babington, Jr.